

M e m o r a n d u m**185.0350**

To: Mr. Glenn A. Bystrom

November 28, 1990

From: Ronald L. Dick
Senior Tax CounselSubject: T--- R. and B--- L. M---
B--- L---SR -- XX-XXXXXXX-010
SR -- XX-XXXXXXX-010

This is in reply to your request for our opinion as to a hearing report concerning the above named petitioners.

Hearing Officer William Burkett has concluded that the petitioners were employees of S---. In a June 4, 1990 memorandum, I concluded, under similar facts, that the person who operated the station was the retailer. After reviewing the files on these cases, I remain of the opinion that the retailer in each case is the person who operated the station.

In reaching his conclusion, Mr. Burkett relied partly on the case, Gipson v. Davis Realty Company, 215 Cal.App.2d 190, for the proposition that, "[o]ne who is subject to the absolute control and direction of his principal in regard to any act, labor or work is an employee and not an agent." I believe that the rule cited, applied to the facts of this case, calls for the opposite result. There is no evidence that there were personal service contracts in these cases. It appears that the station operators were free to employ others to operate the stations so long as the motor vehicle fuel was sold. The petitioners do not appear to be hired as employees. Rather, they earned commissions or earned a flat fee for operating and selling motor vehicle fuel to customers on behalf of the oil company. Although S--- may be the lessee of the premises, the fact remains that S--- left fuel in the possession of persons with the power to transfer title to the fuel to third persons without any further action on the part of S---. I believe that Sales and Use Tax Regulation 1569, Consignees and Lienors of Tangible Personal Property for Sale, dictates the conclusion that the transactions are consignment sales whereby the operators of the service stations are retailers of the fuel. Further, even were we to find that petitioners acted as employees, I believe that they should be estopped from denying liability where they obtained seller's permits for the stated purpose of operating the service stations.

RLD:sr